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# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 895

JAMES R. HOFFA, ZACHERY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, AND CALVIN KOVENS, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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No. 911

BENJAMIN DRANOW, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinions of the court of appeals on remand (Pet. No. 895 App. 91–104, 104–117) are not yet reported. The opinion of the district court on remand (Pet. No. 895 App. 78–90) is reported at 273 F. Supp. 141. The original opinions of the court of appeals

(Pet. No. 895 App. 1–33, 34–71) are reported at 367 F. 2d 698, 716. The *per curiam* opinion of this Court remanding the case (Pet. No. 895 App. 74–77) is reported at 387 U.S. 231.

## JURISDICTION

The judgment of the court of appeals was entered on August 15, 1968 (Pet. No. 895 App. 118). A petition for rehearing was denied on November 7, 1968 (Pet. No. 895 App. 119). On November 26, 1968, the Chief Justice extended the time for filing the petitions for writs of certiorari until January 6, 1968. The petition in No. 895 was filed on January 3 and the petition in No. 911 was filed on January 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the government established that its case at trial was not tainted by the overheard Burris-Sigelbaum conversation.

2. Whether the petitioners were prejudiced at trial because they were not given access to certain documents in the government's possession.

3. Whether it was proper for the district court at the eavesdrop hearing to allow the government to rely upon affidavits to show the nonexistence of certain documents.

4. Whether it was proper for the district court to examine *in camera* certain overhearings of defendants which the government had represented to be wholly irrelevant to petitioners' convictions and to deny dis-

closure to the defense of such overhearings when the the court found that they were in fact irrelevant.

5. Whether the district court erred in refusing to order the government to produce any overhearings it might have involving defense counsel and whether petitioners were prejudiced because five overhearings of counsel of record not relevant to this case were disclosed to the court of appeals following oral argument.

6. Whether the district court acted within its discretion in finding petitioner Dranow competent to participate in the eavesdrop hearing.

7. Whether the temporary admission against petitioner Dranow of certain statements made by him deprived the other petitioners of their right to confrontation under *Bruton* v. *United States*, 391 U.S. 123, where this evidence was ultimately excluded as to all petitioners including Dranow (and the jury was so advised) and where Dranow was a witness in his own defense and was thus available for cross-examination by the other petitioners.

## STATEMENT

### I

### INTRODUCTION

In August 1964, following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were found guilty of various counts of a 28-count indictment returned on June 4, 1963, charging wire and mail fraud in violation of 18 U.S.C. 1341 and 1343 in the procurement of loans from the Teamster Union Pension Fund and of conspiracy to commit these substantive offenses

(I D.A. 41–77, 28).[1] They were variously sentenced to fines and terms of imprisonment (I D.A. 31–32, III D.A. 2265–2267; see Government's Brief in Opposition in No. 1003, O.T., 1966, pp. 3–4, n. 3). On October 4, 1966 the court of appeals affirmed as to each petitioner, Judge Swygert dissenting (367 F. 2d 698, 716; Pet. No. 895 App. 1–33, 34–71). Thereafter, upon the government's disclosure in its response to the petition for a writ of certiorari (No. 1003, O.T., 1966) that it had overheard a conversation between defendant George Burris and one Benjamin Sigelbaum on December 2, 1963, in which Burris discussed certain matters relevant to this case,[2]

[1] In order to avoid confusion, our references to the extensive record in the case will be the same form as used by petitioners. Thus, "D.A." designates the three-volume appendix summarizing the trial transcript filed by petitioners on the original appeal; "G.A." is the 1-volume government's appendix in the original appeal; "H.D.A." refers to the three-volume appendix of the eavesdrop hearing held pursuant to the remand. "Tr." refers to the voluminous transcript of the original trial; and "H. Tr." designates the transcript of the eavesdrop hearing.

[2] At the time of the disclosure to this Court the government was proceeding under the policy of reviewing whether there had been prior instances in which an unlawful electronic surveillance had affected a case which had been brought to trial and of notifying the appropriate court whenever it discovered monitoring information which was arguably relevant to the litigation before the court. See the Government's Supplemental Memorandum in *Schipani* v. *United States*, No. 504, O.T., 1966; see also Memorandum for the United States in Opposition in *Kolod* v. *United States*, No. 133, O.T., 1967, pp. 3–5. *Cf. Granello* v. *United States*, 386 U.S. 1019, and the Brief in Opposition for the United States in that case, No. 750, O.T., 1966 at p. 19 n. 12.

This Court did not hold that the government was not authorized *ex parte* to make the determination of relevancy until long after the conclusion of the hearing in this case. *Kolod* v. *United States*, 390 U.S. 136, decided on January 29, 1968

this Court remanded the case to the district court for a hearing to determine whether that or any other electronically overheard conversation had tainted any of the convictions (387 U.S. 231; Pet. No. 895 App. 74–77). Following such a hearing the district court found no taint (273 F. Supp. 141; Pet. No. 895 App. 78–90). The court of appeals affirmed, Judge Swygert dissenting (Pet. No. 895 App. 91–104, 104–117).

## II

### THE ORIGINAL PROCEEDINGS CULMINATING IN THIS COURT'S ORDER OF REMAND

The evidence adduced at trial to support the charge of mail and wire fraud and conspiracy is fully detailed in the government's brief in opposition filed in response to the first petition for writ of certiorari in the October Term, 1966. We rely on that brief for the detailed presentation of the relevant facts (see government's brief in opposition in No. 1003, O.T., 1966, pp. 5–33, hereinafter "Br."). Here, we shall only summarize the nature of the crime and the purposes and roles of the various petitioners.

The core of the scheme proved at trial was the illegal procurement of money from the Teamster Pension Fund through the filing of fraudulent loan applications. The unlawful conduct of the petitioners was prompted by a need to extricate from financial difficulties Sun Valley, Inc., a Florida real estate corporation in which petitioners Hoffa, Burris and

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(pending on Motion to Amend Order of January 29, 1968, *sub nom. Alderman v. United States*, No. 133, O.T., 1967).

Dranow had substantial interests (Br. 6–9). To this end, falsely inflated loan applications were filed with the Pension Fund and money so obtained was diverted to the rescuing of Sun Valley and to the personal profit of the petitioners. The evidence showed that approval for these loans was obtained by exploiting petitioner Hoffa's position of dominance over the Board of Trustees of the Fund (*e.g.*, Br. 14, 16, 17, 18–19, 20, 23, 26). Hoffa was anxious to revitalize Sun Valley because of his own personal interest in that venture and because he had been harmed by the public disclosure of the involvement of Teamster funds in that failing enterprise (Br. 6–7, 8–9, 11–13). Dranow, Burris (and to a lesser extent Kovens) were variously Pension Fund "borrowers" (*e.g.*, First Berkely and Good Samaritan Hospital transactions, Br. 22–28), agents for the procurement of loans (*e.g.*, the Connelly-Everglades transaction, Br. 10–13), and participants in the rehabilitation of Sun Valley (Br. 9, 13, 24–25). In addition to their interest in rescuing Sun Valley, they were also motivated by a desire for personal enrichment (see, *e.g.*, Br. 11, 13, 14–15, 19). Strate and Hyman[3] were primarily borrowers from the Fund (Strate-Pelican transaction Br. 13–17; Hyman-Key West Foundation transaction, Br. 17–22) who, knowing of the overriding goal, joined the scheme with the understanding that to obtain loans for themselves and their projects, they would have to divert funds to Sun Valley (Br. 17, 19). Weinblatt participated as Dranow's alter ego in several transactions

[3] Hyman died some time prior to the eavesdrop hearing (see I H.D.A. 176–177).

(Br. 8–9).[4] As a result of petitioners' fraud on the Pension Fund, Sun Valley was rendered substantial financial assistance in its successful efforts to withdraw from bankruptcy proceedings (Br. 31–32) and petitioners themselves were personally enriched (*e.g.*, Br. 13, 17, 21–22, 23–25, 28).

## III

### THE HEARING HELD BY THE DISTRICT COURT

#### A. THE SCOPE OF THE HEARING

Pursuant to this Court's order remanding the case to the district court (*Hoffa* v. *United States*, 387 U.S. 231; Pet. No. 895 App. 74–77), hearings were held in the summer of 1967. Early in the hearing the court (Judge Austin) stated that, in the first instance, it would require the government to establish *prima facie* that the admittedly overheard Burris-Sigelbaum conversation of December 2, 1963, did not "taint" any of the convictions and that there were no other "electronic trespasses" which resulted in the obtaining of any evidence "which aided in the conviction in this case" (II H.D.A. 797, 793). The court deemed this latter category to include any electronically overheard conversations in which any of the defendants participated. Accordingly, it directed the government "to disclose what electronically eavesdropped conversations involving these defendants that there is a record of in the Federal Bureau of Investigation and in the Internal Revenue Department, * * *" (II

[4] Weinblatt's lesser role was recognized by the trial judge who sentenced him to 1 hour in the custody of the United States Marshal and to a fine of $5,000 (ID.A. 32).

H.D.A. 858; see also III H.D.A. 1365, 1430). When the defense objected to the fact that the government was not being directed at that time to disclose overheard conversations of lawyers, the judge responded that such disclosure was not within the ambit of this Court's order (II H.D.A. 857–858; see also III H.D.A. 1069). The court stated, however, that the defense would be permitted to "produce whatever evidence [it] can find in regard to electronic eavesdropping and the other defendants in this case, or the lawyers in this case, in which this trial was discussed, or preparations for this trial was discussed" (II H.D.A. 805–806, 807, 857–858).

B. THE EVIDENCE ADDUCED BY THE GOVERNMENT AT THE HEARING

*1. Overheard conversations other than Burris-Sigelbaum*

Government counsel represented to the district court that, in addition to the Burris-Sigelbaum conversation of December 2, 1963, it had in its possession nine logs of "certain isolated accidental and absolutely irrelevant overhearings of some of these defendants."[5] (II H.D.A. 849, 852–853; III H.D.A. 1524–1525). The government introduced into evidence an affidavit from Charles Bolz, Chief of the Accounting and Fraud Section of the F.B.I., to the effect that "diligent searches" of F.B.I. records regarding "elec-

[5] Government counsel advised the court that the discovery of such "trivial" items was the result of a "massive search" over a period of almost nine months (II H.D.A. 852).

tronic eavesdropping"[*] of conversations participated in by any of the defendants in this case, disclosed only the Burris-Sigelbaum conversation of December 2, 1963 and the conversations which were contained in sealed Exhibit 1-A (II H.D.A. 850-851, 863-864). This sealed exhibit, containing the logs of the nine conversations, was attached to the Bolz affidavit (II H.D.A. 851-852). The government turned over Exhibit 1-A to the court for an *in camera* inspection (G. Ex. 1-A, II H.D.A. 848-849). Following its inspection of all the logs contained in Exhibit 1-A, the district court concluded that they were "not remotely relevant" to the issues involved in the case and accordingly denied the defense request to examine them. The court further ordered that the logs be resealed and made available to the court of appeals on appeal (II H.D.A. 864-865).

An affidavit sworn to by Leon Green, Deputy Assistant Commissioner for Compliance of the Internal Revenue Service, was also read into the record. This affidavit stated that diligent searches of the files and records of the Internal Revenue Service had failed to disclose any electronic overhearings of the defendants (II H.D.A. 854-855). The court denied the defense request to strike the Bolz and Green affidavits (II

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[*] Government counsel pointed out that the term "electronic eavesdropping" was meant to include not "only bugging or the placing of an electronic device by trespass" but also "wiretapping" (II H.D.A. 865).

H.D.A. 855, 862–863), pointing out that no restrictions would be placed upon the defense calling these affiants as witnesses or otherwise endeavoring to establish the falsity of their affidavits (II H.D.A. 860–861). The defense never sought to call either Bolz or Green as witnesses.[7]

*2. The Burris-Sigelbaum conversation*

The government introduced into evidence all records it had of the December 2, 1963, conversation between petitioner Burris and Benjamin Sigelbaum—*i.e.*, a certified copy of the F.B.I. log of that intercepted conversation (G. Ex. 1, I H.D.A. 233–249; see II H.D.A. 820–823), and two memoranda summarizing the log—one dated December 26, 1963 (G. Ex. 3–1, I H.D.A. 253–257) and the other dated January 11, 1964 (G. Ex. 2–3, I H.D.A. 250–252).

*a.* The substance of the conversation as it appears in the log is as follows: Burris mentioned certain tax problems he had and requested that Sigelbaum buy out "some of his deals" (I H.D.A. 234). There then followed a short discussion of the political situation in Washington, D.C. (I H.D.A. 234). Burris returned to his personal financial problems, and mentioned the possibility of transferring a 10% interest in Sun Valley to Sigelbaum (I H.D.A. 234–235). The latter responded that he had a prior claim against that interest but had not pressed it because of his concern

[7] Joseph Harmon who, in 1963, was assistant Chief of the Intelligence Division of the Internal Revenue Service was called as a defense witness at the hearing and testified that to his knowledge there was no electronic eavesdropping or wiretapping of any conversations of the defendants in the instant case, from 1961 through 1964 (III H.D.A. 1421, 1425, 1436).

about getting Dranow into trouble since everyone wanted Dranow and Hoffa to get "straightened out" (I H.D.A. 235–236, see also I H.D.A. 239–240). Sigelbaum also spoke of an unnamed bank's claim against Sun Valley, and allowing it to precede his (I H.D.A. 235–236; see also I H.D.A. 242). Burris advised Sigelbaum that he had paid for his 10% Sun Valley interest by borrowing $57,000 from one Kipnis, which amount he later repaid from a fee he received from Kipnis. He said that they "were supposed to get another ninety thousand dollars" (I H.D.A. 236–237). Sigelbaum mentioned that he had tried to get Burris more money, which the latter would not accept (I H.D.A. 237). Sigelbaum referred again to his own and others' claims against Sun Valley and noted that "Willis" was the trustee of these claims (I H.D.A. 237–239). Sigelbaum referred to his "bail-out" of Dranow and Sun Valley, pointing out that others who knew nothing of this just sat back and made their profit (I H.D.A. 240–241). Burris said that he had given the bank $5,500 out of his personal account (I H.D.A. 243). When Sigelbaum inquired about the nature of the charges against Burris and how far he was involved, Burris replied that the government's case was not a good one but that the jury might conclude that where "there is smoke there must be some fire" (I H.D.A. 243–244). He said that the case had nothing to do with income tax and that his fee from the "Airport" was in the form of a check and he had reported it (I H.D.A. 244–245). Burris further stated that the government could not prove any fraud or conspiracy involving the Pension Fund because of the

strict manner in which the Fund was run (I H.D.A. 245–246). Sigelbaum then referred to "Bill Manheight" who, he said, was an attorney who had been interviewed by the FBI concerning his Pension Fund loan application and, who, Sigelbaum believed, would make an excellent defense witness (I H.D.A. 246–247, 248). Sigelbaum inquired about defendant Hyman and his Key West Foundation transaction. Burris responded that Hyman had used Pension Fund loans "a little bit differently" than he was supposed to but that he had ultimately spent the money on the property for which the loans had been obtained (I H.D.A. 248).

*b.* The government also introduced evidence as to the preparation and distribution of the log. It showed that a listening device had been installed by trespass in the Sigelbaum office in January, 1963 (III H.D.A. 1335–1339). The Burris-Sigelbaum conversation was monitored by F.B.I. Agent Fleck on December 2, 1963 (III H.D.A. 1168–1169). In accordance with normal practice, at the start of the conversation, Fleck activated a tape recorder and took hand-written notes. From the notes and tapes, he prepared a log which he turned over to his relief agent who, in turn, passed it on to Agent Swinney, his supervisor (III H.D.A. 1131–1133, 1168–1169, 1208–1209).[4] Swinney wrote the name of F.B.I. agent Connors on the first page of the log so that agent would see it since

[4] In accordance with usual practice the notes were destroyed and tapes erased after the log was prepared (III H.D.A. 1151–1152, 1171–1172, 1198–1199, 1203, 1250, 1336, 1345, 1348).

Swinney knew that Connors had "an investigation going concerning Sun Valley" (III H.D.A. 1342, 1356–1357; see also III H.D.A. 1269, 1384). Swinney did not discuss the contents of the log with Connors (III H.D.A. 1356–1357) and knew nothing of the substance of the Sun Valley investigation (III H.D.A. 1384–1385). Swinney also wrote on the log the name "Doerner" the F.B.I. agent in charge of the Sigelbaum investigation (III H.D.A. 1342, 1243–1244).

Agent Connors testified that he had seen the log, but not the notes nor the tapes from which the log was prepared (III H.D.A. 1046). Connors routed the log to agent Doerner, the next name on the list, and advised Doerner that the "George" mentioned in the log was George Burris (III H.D.A. 1045–1047, 1247–1248).[9] Doerner did not send the log on or discuss it with anyone but Connors (III H.D.A. 1248–1249, 1258).

Connors prepared two summary memoranda of the log, on December 26, 1963, and January 11, 1964,[10] and forwarded them to F.B.I. headquarters in Chicago and Washington, D.C. (III H.D.A. 1032–1033, 1051–1052). Connors did not forward either report to

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[9] The monitoring agent (Edward Fleck) had thought "George" was possibly George Simon (III H.D.A. 1176–1177).

[10] Connors testified that the second memorandum differed from the first in that it contained "administrative corrections"—*i.e.* it was written "in more general terminology, leaving out some of the direct quotations and excessive wording" (III H.D.A. 1058). The two memoranda are set out at I H.D.A. 251–252, 253–257.

government counsel and never discussed their contents with government attorneys or special investigator Walter Sheridan (III H.D.A. 1054–1056). Connors further testified that he had examined the files in the Miami office of the F.B.I. relating to this case for the period December 1, 1963 to the date of the hearing and that such examination revealed that no one had requested or conducted an investigation based on the log or the two memoranda he prepared therefrom (III H.D.A. 1160–1162; H. Tr. 1320). The January 11 memorandum was sent to the attention of Walter J. Sheridan, a special investigator of the Criminal Division of the Department of Justice (G. Ex. 2–3, I H.D.A. 250, III H.D.A. 1272–1273, 1276–1277).

Government trial attorney, William Ryan, testified that since his initials appeared on the routing slip attached to the January 11 memorandum, he apparently had seen a copy, although he had no independent recollection (III H.D.A. 1113–1115, 1117).[11] He had no recollection of discussing it with any other attorney involved in the prosecution of the case until sometime in 1967, long after the prosecution had been concluded (III H.D.A. 1118). He did not see the actual log of the conversation before 1967 (III H.D.A. 1109–1110). Ryan testified that his review of Department of Justice files for the period December 1, 1963 until the end of July 1964 (the verdict in the trial of this case was returned on July 26, 1964, I D.A. 28) showed that he never requested nor conducted an investigation based on the

[11] The December 1963 memorandum was not seen by government attorneys until after the trial (III H.D.A. 1059).

January 11, 1964 memorandum. To the best of his knowledge no one else requested such an investigation (III H.D.A. 1125–1126).[12]

*c.* The government also established in detail that it had independent sources for all the relevant facts mentioned during the overheard conversation.[13]

(1) The Burris, Dranow, and Hoffa interests in Sun Valley

The evidence as to Hoffa's financial interest in Sun Valley beginning in 1955 or earlier, his deposit of Teamster Union Funds in a "restricted" account in a Florida bank to secure $400,000 in loans made to Sun Valley by that bank, Sun Valley's financial difficulties, and the creation of Union Land & Home Company by Dranow and Burris to purchase a Sun Valley stock option from Hoffa and to rehabilitate Sun Valley, is fully detailed

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[12] Other government trial counsel—*i.e.*, Messrs. Poretz, Smith, Canavan, and McTiernan—had also been sent the January 11, 1964 memorandum shortly after its preparation and certain of them had written comments thereon (I H.D.A. 250–252, 126–127). The government sought to introduce the affidavits of every government attorney who came into contact with the January 11, 1964 memorandum to the effect that the information contained therein never provided any leads and that no governmental investigation was conducted based on it (III H.D.A. 1226–1227). The court sustained the defense objection to the admission of such affidavits (III H.D.A. 1242–1243).

[13] Most of this independent source material consisted of interviews conducted by government agents predating the Burris-Sigelbaum conversation. The agents who had conducted these interviews (including several with Burris and with Sigelbaum) testified that the documents the government introduced at the hearing to show independent source were the accurate reports they had prepared of such interviews (II H.D.A. 869–870, 884–886, 921–922, 932–934, 942–947, 965–972; III H.D.A. 1004–1007; see also II H.D.A. 882–884, 928–931).

in our original brief in opposition (Br. 6–9). Extensive information relating to these matters was in the government's possession long before the December 1963 conversation. This information derived, among other sources, from Burris' sworn testimony before a Senate (McClellan) Committee on June 29, 1959 and before a grand jury in October 1959 (See G.A. 74–82, 92–103); Hoffa's statement under oath on September 17, 1958 (G.A. 83–91); an F.B.I. interview with Burris on February 17, 1960 (G. Ex. 17A I H.D.A. 310–315) and on October 2, 1962 (G. Ex. 19A, I H.D.A. 321–324).

(2) Sigelbaum's interest in Sun Valley

In an interview with the F.B.I. on November 8, 1960 Sigelbaum described in some detail his membership in a group which, after conferences with Dranow, had invested $250,000 for a 50% interest in Sun Valley stock and stated that his own investment amounted to over $66,000 (G. Ex. 4A, I H.D.A. 257–262; III H.D.A. 1228–1229). Similar information was contained in the statement of Edwin Willis (one of Sigelbaum's associates in the Sun Valley venture) to the F.B.I. on December 22, 1960 (G. Ex. 9A, I H.D.A. 279–282, III H.D.A. 1229).[14] Also introduced at the hearing was the November 15, 1960 statement of Julius Friedman, the attorney representing the Sigelbaum interests in this venture, which referred to that group's further investment in Sun Valley (G. Ex. 5A, I H.D.A. 262–270, 267).

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[14] Willis' statement of December 22, 1960 (G. Ex. 9A, I H.D.A. 279–282, 280) further directly provided the information contained in the log that Willis was to be the "trustee".

(3) A bank's claim against the Dranow-Burris interest in Sun Valley

Information relating to this matter was contained in detailed testimony before a federal grand jury on October 9, 1962 from Lou Poller, an officer of the Miami National Bank, which had numerous dealings with the Teamster Pension Fund. According to Poller's testimony, Dranow had an account at the Miami bank which became overdrawn by more than $50,000 and Poller covered this from his own account. Poller thereafter threatened to overturn the sale of Sun Valley stock unless he or the bank received 10% from the Dranow-Burris interests in that stock (See G. Ex. 25A, I H.D.A. 437–440; III H.D.A. 1229–1232). See also, Poller's F.B.I. interview of July 25, 1962 (G. Ex. 14A, I H.D.A. 299–300).

(4) The $57,000 transaction between Burris and Kipnis

The government's information relating to this transaction[11] came from several sources pre-dating the Burris-Sigelbaum conversation of December 1963. This transaction was referred to by Kipnis in F.B.I. interviews on July 2, 1962, July 31, 1962 and October 31, 1963 (G. Exs. 6A–8A, I H.D.A. 270–279; III

[11] The trial evidence revealed that, in 1960, Irving Kipnis had agreed to pay Burris a fee to obtain a Pension Fund loan to build the Causeway Inn. At about the same time, Kipnis gave Burris $57,000 for an option to buy 10% of Sun Valley with the further agreement that the option would become a loan if Kipnis decided not to exercise it. The option ultimately became a loan to Burris which was used to rehabilitate Sun Valley. Burris repaid it in 1962 out of fees he had received in procuring the Causeway Inn loan for Kipnis (II D.A. 1386, 1389–1391).

H.D.A. 1004–1007). In addition, Kipnis discussed this transaction in an affidavit given to the Internal Revenue Service on May 31, 1963 (G. Ex. 11, I H.D.A. 284–290; see III H.D.A. 1103–1105), and in an interview with the F.B.I. and I.R.S. on August 6, 1962 (G. Ex. 12A, I H.D.A. 290–294, 291).[16]

(5) Sigelbaum's use of the term "bail-out"

The government showed that the use of the phrase "bail-out" to describe the attempt to take Sun Valley out of reorganization long preceded the Burris-Sigelbaum conversation of December 1963. At trial, Carl Langford, the trustee of SunValley during reorganization, had testified that in 1960 defendant Hyman had asked him what it would take to "bail the corporation out of its difficulties" (II D.A. 1399–1400).

(6) Burris received a fee from the airport

This apparently refers to transactions involving the procurement of loans to construct a hotel at the Miami Airport. Between 1959 and 1961 George Simon, a Miami accountant, secured Teamster Pension Fund loans for such construction with the assistance of Burris. Simon paid Burris a finder's "fee" for his services in procuring the loans (II D.A. 1174, 1179–1185). Detailed information relating to this transaction came from Simon's statements to the F.B.I. on February 2, 1961, and February 14, 1961 (G. Exs. 15A–16A, I H.D.A. 301–310); see also, the February 15, 1961, statement of one Jack B. Cooper, a stockholder in

[16] Kipnis also recounted the details of this transaction in testimony before a federal grand jury sitting in Chicago, on September 18, 1962 (G. Ex. 22A, see I H.D.A. 373).

Airway Hotel Inc., stating his awareness that "finders's fees" had been paid to Burris (G. Ex. 10A, I H.D.A. 283–284).

(7) The procedures of the Pension Fund

The safeguarding procedures said to have been employed by the Teamster Pension Fund in processing loan applications were described before a federal grand jury on February 8, 1962, by Morris Lieberman, Appraiser for the Pension Fund (G. Ex. 20A, I H.D.A. 324–349), and on October 17, 1962, by Stanford Clinton, General Counsel for the Pension Fund (G. Ex. 26A, I H.D.A. 441–448).

(8) Hyman's expenditures of Key West Foundation loan proceeds

As developed at the trial, defendant Hyman had obtained Pension Fund proceeds in 1959 and 1960 for Key West Foundation for the avowed purpose of building a shopping center and for remodeling an apartment development and had used such proceeds during the period in question for purposes other than those represented to the Pension Fund (See Br. 19–22). At interviews with F.B.I. agent Godwin on June 20 and July 7, 1961, Hyman advised that he had used $100,000 of Pension Fund proceeds loaned to Key West Foundation to purchase a one-half interest in Sun Valley (II D.A. 900, see also II D.A. 892–897). There was also the testimony of Cecil Black (who did carpentry and masonry work for Hyman) who testified before a grand jury on August 27, 1962 (G. Ex. 27A, I H.D.A. 449–460) and at trial (II D.A. 919–930, erroneously titled in the Appendix, *"Testimony of Burton Harrison"*) that he had signed waivers

for receipt of loan funds for construction payments from Hyman (some $656,000), when, in fact, he had not actually been paid such funds (see G.A. 138–145). There was also testimony at trial that payment had not been made to another creditor, contrary to what Hyman had represented to the Fund (see II D.A. 908, 935–936, 938–939). This testimony and supporting documentary evidence thus showed that from May to November 1960 Hyman obtained the full amount of the second Pension Fund loan ($400,000) by misrepresenting to the Fund that construction expenses amounting to $706,000 had in fact been incurred (see G.A. 134–145, 323–324, 344–345).

At the hearing, agent Connors testified that he had examined the books of Key West Foundation in 1962 and at the end of September 1963, at the request of government counsel then involved in preparation for the trial, and had used these records to prepare schedules relating to the disposition of Pension Fund loans by Key West Foundation (III H.D.A. 1007–1008, 1081).[17] Based upon his examination of the books of Key West, ledger sheets, checks and other exhibits in evidence (III D.A. 1681–1682), he had testified at trial that during this period of allegedly heavy construction expenses by Key West Foundation (November 1959 through December 1960), with Hyman making periodic "construction draws" on the Pension Fund loans assertedly to pay creditors (see, *e.g.*, G.A. 138-142), no payment to creditors in the amount al-

[17] Government Exhibits 21A and 24A reveal that the books and records of Key West Foundation had been turned over to the government in September and October 1962 (I H.D.A. 350–352, 432–436).

leged appeared in the books and records of Key West Foundation (III D.A. 1683, 1686, 1687, 1693, 1701, 1709, 1740; see II H.D.A. 585–586).

Agent Connors testified that certain of his accounting schedules (those dealing with Key West Foundation books for the latter part of 1962) were prepared in 1964 (III H.D.A. 1027, 1038). This was after he had seen the log of the Burris-Sigelbaum conversation of December 2, 1963 and had prepared the two memoranda of that log (III H.D.A. 1027). He also testified that the accounting "summaries" he had actually used at trial were prepared a few weeks before his trial testimony at the direction of the government prosecutors, and were basically "a recap of the older summaries" (III H.D.A. 1028–1030, 1011).[18] He stated that the December 1963 conversation "meant nothing to" him and he "did not consider that conversation" in preparing his accounting documents (III H.D.A. 1027–1028); that the Key West books and records showed that by the end of December 1960, all Pension Fund loans received up to that time had been spent (III H.D.A. 1041); that when he prepared his accounting summaries, he did not know that it would be

[18] During cross-examination at trial, Connors had testified that some of the accounting worksheets he had earlier prepared were destroyed—some at the end of 1962 and others about seven weeks before trial—because he had been advised by the government prosecutors that they were not to be used. He further stated that "some" of these destroyed worksheets dealt with a period beyond December 31, 1960—*i.e.*, the cut-off date of the summaries used at trial (See III D.A. 1726–1728; II H.D.A. 593–594, 597). He further explained that his trial summary "of the whole picture" superseded these earlier worksheets (III D.A. 1727, 1731–1732).

the defense's contention at trial that Hyman had ultimately spent all the Key West Pension Fund loan proceeds in a proper fashion (III H.D.A. 1078–1079); and that he never directed that the memoranda he prepared from the log be sent to government trial counsel, nor discussed the log of the Burris-Sigelbaum conversation or either of the two memoranda based thereon with any government trial counsel (III H.D.A. 1030, 1033, 1034–1035, 1057, 1086–1087).

(9) Reference to potential witness Bill Manheight

William Ryan, one of the Department of Justice attorneys involved in the prosecution of this case, testified that he had never heard of nor interviewed any "Bill Manheight" and that "Manheight" was not called as a witness to testify at trial (III H.D.A. 1120). Agent Connors testified that he had never heard of "Manheight" nor seen any report concerning an investigation of "Manheight" (III H.D.A. 1052).[19]

C. THE FINDINGS OF THE COURTS BELOW

1. After summarizing the evidence adduced at the hearing, including that presented by the defense (see Pet. No. 895 App. 78–89), the district court concluded "that the government obtained no new information from the electronically eavesdropped overhearings in

[19] "Philip Monheit" testified as a defense witness at the hearing that he had in the past applied for a Teamster Pension Fund loan, but had never gone through "with the deal" and that in February 1963 he had been interviewed by an F.B.I. agent (I H.D.A. 224–226; III H.D.A. 1330–1335). Monheit never testified at trial nor was his name mentioned in connection with any evidence adduced at trial (H. Tr. 1723).

the record and that none of the overhearings had any relevance to the convictions of any of the defendants." Accordingly, it found "that the convictions of none of the defendants were tainted by the use of evidence improperly obtained" (*United States* v. *Hoffa*, 273 F. Supp. 141, 147 (N.D. Ill); Pet. No. 895 App. 89–90). With particular reference to the nine overhearings submitted for *in camera* inspection (G. Ex. 1A), the district court stated that it had carefully read the "extremely brief overhearings" and that they "contain no information either remotely or peripherally relevant to the transactions and evidence on which these defendants were indicted and convicted" (273 F. Supp. 141, 143; Pet. No. 895 App. 79–80). The district court thereupon denied the motions for a new trial, entered new final judgments of conviction against each of the defendants and reimposed the sentences originally imposed (I H.D.A. 155–164).[20]

2. The court of appeals affirmed, Judge Swygert dissenting. The majority agreed with the district court that none of the convictions was based on tainted evidence; that the nine overhearings of defendants which had been submitted for *in camera* inspection to the district court were not "remotely" relevant; and that the other questions raised on appeal were without substance (Pet. No. 895 App. 91–104). In response to inquiry during oral argument of the appeal government counsel disclosed to the court of appeals that certain lawyers of record for the defendants in the original

[20] Except as to defendant Hyman who had died sometime prior to the hearing (See I H.D.A. 176–177).

Pension Fund trial had been electronically overheard talking to persons other than defendants about matters not related to this case and submitted the logs of these overhearings to the court for *in camera* inspection. Based upon its *in camera* examination of these logs the court concluded that "the information is completely irrelevant to the Hoffa case before this Court" (Pet. No. 895 App. 98).[21]

## ARGUMENT

Petitioners' contentions fall into two broad categories: It is first urged that this Court should grant plenary review to remedy alleged errors resulting from the eavesdrop hearing held pursuant to this Court's order of remand (Pet. No. 895, pp. 55–77; Pet. No. 911). It is next asserted that errors flowing from the original conviction in 1964 justify issuance of the writ (Pet. No. 895, pp. 76–106). Since the alleged errors flowing from the conviction were raised in the original petition (No. 1003, O.T. 1966) and are fully answered in our original brief in opposition, we do not repeat those responses here but rely upon that brief.[22] However, since one of the earlier contentions has been recast to rely on *Bruton* v. *United States*, 391 U.S. 123, we shall answer that contention in this brief.

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[21] Both the sealed defendant overhearings and the overhearings of attorneys are on file with the Clerk of this Court.

[22] We are filing herewith 10 additional copies of our original brief in opposition which we have asked the Clerk to distribute to the Court.

# I

## ISSUES ARISING FROM THE EAVESDROP HEARING

### A. THE BURRIS-SIGELBAUM OVERHEARING

The facts detailed in the Statement show that the government's evidence at trial stemmed from sources wholly independent of the Burris-Sigelbaum conversation and that the conversation did not provide investigative leads and was not used in any fashion at trial.[23] The government's case was predicated upon years of extensive, independent investigation predating the unplanned overhearing of Burris on December

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[23] For the first time in this Court petitioners urge (Pet. No. 895, pp. 66–67) that the "beyond a reasonable doubt" standard of *Chapman* v. *California*, 386 U.S. 18, should be applied to determine whether the government has established lack of taint in the Burris-Sigelbaum conversation. This standard was not, however, urged in the district court or in the court of appeals. There the government agreed with the view expressed by petitioners in their brief that the "clear and convincing evidence" test announced in *United States* v. *Wade*, 388 U.S. 218, 240, was the appropriate standard (see petitioners' brief in the court of appeals, p. 57; cf. the government's brief in the court of appeals, p. 38). Petitioners have not shown any "exceptional circumstances" which would allow them to make this contention for the first time in this Court. See *Lawn* v. *United States*, 355 U.S. 339, 362–363, n. 16. Nor do the court of appeals cases which petitioners cite (Pet. 67) point to the adoption of the *Chapman* standard in the present context. They hold only that if illegally seized evidence is introduced at trial, the government must meet the *Chapman* test in order to show lack of prejudicial error.

In any event, our position is that whatever standard is applied, the government met its burden of establishing lack of taint arising out of the Burris-Sigelbaum conversation.

2, 1963.[24] Indeed, the detailed indictment in this case—which was returned some six months before the Burris-Sigelbaum conversation took place—dealt with all the loan transactions proved at trial (1 D.A. 41-77). As the majority below noted, "[i]t is apparent the charges made against the defendants in the indictment were drawn in such detail and particularity that they could have come only from a full investigation of all the facts underlying the scheme. It is neither conceivable nor realistic to believe that this information could have been obtained from a cryptic half hour conversation which occurred six months after the indictment had been returned" (Pet. No. 895, App. F 97).[25]

1. *a.* Petitioners contend that the government obtained a theory of the defense because of overhearing Sigelbaum comment to Burris that "Bill Manheight" would make a good defense witness to show how difficult it was to get a Pension Fund loan (Pet. No. 895, p. 57). The government, however, did not know who this "potential" witness was until it learned at the eavesdrop hearing that "Bill Manheight" was actually "Philly Monheit" one of the numerous loan

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[24] As the evidence adduced at the hearing made quite plain, the overhearing occurred as a result of the government's surveillance of Benjamin Sigelbaum and "his connection with organized crime" and was not the result of any investigation conducted as to any defendant (See III H.D.A. 1253, 1337, 1349, 1352).

[25] The trial lasted about 13 weeks and involved the testimony of approximately 140 witnesses and the introduction of several thousand exhibits. The trial transcript exceeds 16,500 pages.

applicants who had been interviewed by the government before trial but whose testimony was never adduced at trial (III H.D.A. 1119–1120, 1052, 1330–1333). Moreover, the government was fully aware of the Pension Fund's loan screening procedures from wholly independent sources (see *supra*, p. 19; G. Ex. 20A, I H.D.A. 325, 330–349; G. Ex. 26A, I H.D.A. 441, 443–448). Nor does the fact that one of the government trial counsel wrote "such testimony would not be admissible" next to the January 1964 memorandum's reference to "Manheight" (see G. Ex. 2–3, I H.D.A. 126, 252) support the argument that this individual or his information was ever used by government counsel; the notation reflects only government counsel's normal reaction to information which he believed was clearly not relevant to the case.

*b*. Petitioners' major argument on this aspect of the case (Pet. No. 895, pp. 57–59) stems from the fact that F.B.I. agent Connors, who had prepared the January 1964 memorandum which had been circulated to the government prosecutors, was also a government witness at trial testifying as an accounting expert concerning the expenditures of Hyman's Key West Foundation. Relying on the fact that Connors reported in the memorandum that Burris told Sigelbaum that, while Hyman had used Pension Fund Proceeds "a little differently" at first, he had "ultimately put it into the property" (See I H.D.A. 252), and that government counsel had written the notation "does this check out" on this portion of the memorandum (see I H.D.A. 126), petitioners argue

that Connors, at the behest of the prosecutors, must have tailored his testimony at trial to avoid mentioning Key West's expenditures in 1961, in an effort to anticipate and thwart the defense theory (allegedly learned from the memorandum) that in this later period Hyman had properly expended the Pension Fund loan proceeds.

The Key West Foundation loans from the Pension Fund were obtained in the fall of 1959 and the spring of 1960 (Br. 19–22). It was a condition of the $400,000 loan in 1960 that Hyman would have to expend one dollar for every two dollars loaned by the Fund and that detailed, written proof of expenditures had to be submitted to secure construction "draws." The evidence showed that Hyman withdrew the full $400,000 in 1960 on the basis of documents purporting to show the expenditure of $706,000. The government showed that this documentation was false. In particular it showed, payments of $656,000 allegedly made to Black Construction Company, were not made and that Black was a salaried employee of Hyman who never received more than $125.00 per week for himself. In addition Connors testified that the books of Key West showed expenditures of $186,000, not $706,000, during 1960.

Since the money was paid out by the Fund for money allegedly spent by Hyman in 1960, the government properly proved its case by showing that the alleged expenditures had not in fact been made in 1960. The claim that Hyman did actually spend the money

on remodeling in 1961 [26] was at best a defense in mitigation not going to prove the absence of falsity in the earlier representations made to the Pension Fund. There is thus no reason to read sinister implications into the fact that government counsel told Connors that it was confining his accounting evidence to 1960.[27] Connors testified at the hearing that at the time he prepared his accounting summaries he did not know "it was Hyman's position that he had spent all of the money from the loan on his property" (III H.D.A. 1040), nor did he learn of that fact from any of the defendants "directly or indirectly" (III H.D.A. 1078–1079). He further testified that he had not discussed the log or the memorandum he prepared therefrom with the government prosecutors (see III H.D.A. 1030, 1033, 1034–1035, 1054–1057, 1086–1087) and unequivocally stated that the December 1963 Burris-Sigelbaum conversation "meant nothing to" him in preparing his accounting documents (III H.D.A. 1027–1028).

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[26] Richard Furman, an accountant whose firm audited the books of Key West Foundation, testified, as a defense witness, that Key West's book showed expenditures for construction and improvement in 1961 but his testimony did not show that these expenditures were the ones that Hyman had represented to the Pension Fund were made in 1960 (III D.A. 1776–1781).

[27] Connors testified in cross-examination at trial that he had limited his accounting summary to December 31, 1960 because of a decision by government counsel to that effect shortly before trial and that he had destroyed his earlier prepared accounting papers—some of which related to the post 1960 period—because he had been told by government prosecutors that they were not going to be used (see III D.A. 1701, 1727, 1731–1732).

2. As a variant of the foregoing argument, petitioners urge that the failure of the government to produce for inspection at trial the two memoranda of the log prepared by agent Connors or a memorandum he had prepared in October 1963, violated their rights under 18 U.S.C. 3500 (Pet. No. 895, pp. 59–63).

*a.* The memoranda which Connors prepared from the log of the Burris-Sigelbaum conversation did not relate to the direct testimony of Connors at trial. The agent testified at trial solely as an expert accountant with regard to the books and records of Key West Foundation. Indeed, one of defense counsel at trial objected to Connors' testimony on the ground that the records of Key West Foundation spoke for themselves (III D.A. 1689). In short, Connors' sole function and the entire tenor of his testimony was to provide the jury with an expert's analysis of these documents. Cf. *United States* v. *Donlon,* 256 F. Supp. 336, 341–342 (D. Del.), affirmed, 370 F. 2d 987 (C.A. 3), vacated and remanded for other reasons (No. 121, O.T. 1967), in *Stone* v. *United States,* 390 U.S. 204. The basic purpose of 18 U.S.C. 3500 is to provide for production of documents which have some conceivable relevance to the witness' cross-examination. See, *e.g., Palermo* v. *United States,* 360 U.S. 343, 349–351; *Rosenberg* v. *United States,* 360 U.S. 367, 370; *Ogden* v. *United States,* 303 F. 2d 724, 740 (C.A. 9); *Oertle* v. *United States,* 370 F. 2d 719, 724–725 (C.A. 10), certiorari denied, 387 U.S. 943; *United States* v. *Heap,* 345 F. 2d 170, 171 (C.A. 2).

Here the memoranda did not bear any relevance to Connors' testimony.[28]

In any event, the superficial hearsay comment by Burris added nothing to what the defense already knew of Hyman's expenditures for Key West Foundation. The defense introduced its own expert analysis concerning the 1961 expenditures during their direct case at trial (see III D.A. 1774–1783). Although the factual setting may be different, the reasoning of *Rosenberg* v. *United States,* 360 U.S. 367, 371 applies here: "Since the same information that would have been afforded had the document been given to defendant was already in the possession of the defense * * * it would deny reason to entertain the belief that defendant could have been prejudiced by not having had opportunity to inspect the [document]." See, similarly, *Killian* v. *United States,* 368 U.S. 231, 243–244.[29]

*b.* Petitioners also claim that the government improperly failed to produce at trial a memorandum prepared by Connors on October 8, 1963 relating to

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[28] When, at trial, Connors testified on cross-examination that he rendered no report concerning his work, the inquiry and his answer were obviously directed to accounting work concerning the matters about which he had testified (III D.A. 1726–1727, see also III H.D.A. 1062).

[29] We see no valid basis for distinguishing *Rosenberg* or *Killian* because the information in those cases came into the possession of the defense in a way different from this case—*i.e.*, in *Rosenberg* by way of the witness' testimony at trial and in *Killian*, by way of other statements turned over to the defense. Whatever the source, the defense had full and independent access to information which it is said was denied it by the government.

conversations with government trial counsel concerning his preparation of accounting summaries (See D. Ex. H–7, I H.D.A. 221–224). It is not clear, however, that this document was a "statement" within the purview of 18 U.S.C. 3500. It contained neither recommendations nor conclusions, but was simply a general outline concerning the format that Connors proposed to follow in preparing his accounting papers (See I H.D.A. 221–224). When, at the hearing, defense counsel asked Connors why he had said at trial that he had made no report of his accounting work when in fact he had prepared this report of October 8, 1963, government counsel pointed out that this document was not a report of his accounting work but rather "a report on a conversation in which work was asked to be performed" (III H.D.A. 1062).

But even if this October 1963 memorandum was a "statement" of the witness relating to his direct testimony at trial within the reach of 18 U.S.C. 3500, it had marginal—if any—impeaching value. The document's single reference to 1961 was contained in the heading of an "example" of the type of accounting schedules the agent was preparing, with no reference to any money spent by Hyman during that period of time (I H.D.A. 221–222). Moreover, as we have already stressed, the manner in which Hyman spent funds in 1961 was immaterial to the government's case. By independent evidence the government had established that Hyman had in 1960 misrepresented the extent of construction expenditures to the Pension Fund. Agent Connors simply corroborated this evidence by testifying that Key West's books and records for 1960 showed that no such

expenses had, in fact, been incurred (See Br. 17–22).[30]

*c.* The foregoing discussion fully disposes of petitioner's related claim (Pet. No. 895, pp. 63–65) that the principles of *Brady* v. *Maryland*, 373 U.S. 83, require reversal for failure to disclose these documents at trial. In view of their extremely limited value the failure to disclose these documents for impeachment purposes hardly can be categorized as a due process violation.

B. OTHER ISSUES ARISING FROM THE EAVESDROP HEARING

1. Petitioners assert that the introduction by the government of the affidavits of Charles Bolz, Section Chief of the Accounting and Fraud Section of the Federal Bureau of Investigation and of Leon Green, Deputy Assistant Commissioner of the Internal Revenue Service, to carry its burden of showing that neither the F.B.I. nor the Internal Revenue Service had any overhearings of defendants except those turned over to the defense or the district court for *in camera* inspection [31] denied them the right of confrontation guaranteed by the Sixth Amendment (Pet. No. 895, pp. 72–75). Rule 27 of the Federal Rules of Criminal Procedure, and Rule 44 of the Federal Rules of Civil Procedure, how-

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[30] It should also be noted that the Key West Foundation transaction itself was only a one of nine multi-faceted Pension Fund transactions proved at the trial establishing a far-flung scheme to defraud the Pension Fund.

[31] These affidavits, in essence, stated that both the F.B.I. and the Internal Revenue Service had caused searches to be made of their files to determine if there were any other overhearings of the defendants not turned over to the defense or to the court and that the searches revealed no such additional overhearings (See I H.D.A. 118–119, II H.D.A. 851–852, 854–855).

ever, embody the reasonable principle that there is no occasion to burden government officials with the duty of personal appearance with respect to official records. Lack of a record may be proved by a certified statement of an official that, after diligent search, no such records exist. The sworn affidavits of Bolz and Green satisfied these requirements. See *T'Kach* v. *United States,* 242 F. 2d 937, 938 (C.A. 5); *United States* v. *Ansani,* 138 F. Supp. 454, 461 (N.D. Ill.), affirmed, 240 F. 2d 216 (C.A. 7), certiorari denied *sub nom. Milner* v. *United States,* 353 U.S. 936; *Smith* v. *United States,* 353 F. 2d 838, 844 (C.A.D.C.), certiorari denied *sub nom. Cunningham* v. *United States,* 384 U.S. 910.[32]

In recognition of these controlling precedents, petitioners argue that there is "an apparent" conflict between Rule 27 of the Federal Rules of Criminal Procedure, and the Sixth Amendment (Pet. No. 895, p. 75). The decisions relied upon for this argument, however, are inapposite (Pet. No. 895, pp. 74–75). They basically deal with the denial, of the right to be confronted with and cross-examine the witnesses whose evidence is sought to be introduced on the issue of guilt or innocence at a criminal trial. They have no bearing on the present situation—an eavsedrop hearing at which the officials in a position to know have submitted affidavits confirming the repeated representations of government counsel (see II H.D.A. 845–849, 853, III H.D.A. 1524) that the only records of overhearings of defendants in the government's possession are those which have been turned

[32] Compare *Lawn* v. *United States,* 355 U.S. 339, 348–349, where this Court deemed affidavits submitted by government agents and prosecutors sufficient without a hearing to overcome an allegation of taint.

over to the defense or to the trial court. Indeed, petitioner's argument is particularly weak since the district court stated that the defense could call Bolz and Green as witnesses (II H.D.A. 860–861), and the defense chose not to avail itself of that opportunity. Cf. *Baker* v. *United States,* 401 F. 2d 958, 980 n. 92 (C.A.D.C.).

2. At the express direction of the district court at the eavesdrop hearing the government submitted to that court for *in camera* inspection nine logs of overhearings which government counsel described as "isolated accidental and absolutely irrelevant overhearings of some of these defendants" (see II H.D.A. 849, 852–853; III H.D.A. 1524–1525). After inspecting the logs the district court found that they were "not remotely relevant" to the issues involved in the case (II H.D.A. 864–865). Based on its own independent examination, the majority below agreed without qualification and, relying upon its holding in *United States* v. *Battaglia,* 394 F. 2d 327, pending on petition for a writ of certiorari, No. 168, O.T., 1968, found no error in this procedure (Pet. No. 895 App. 96).

We recognize that the issue whether the results of eavesdropping may first be examined by a judge who in his discretion may then decide that they are unrelated to the case and thus should not be turned over to the defense, is presently before this Court on reargument in *Alderman* v. *United States* (on Motion to Amend the Court's Order of January 29, 1968, No. 133, O.T. 1967) and that the Court may wish to defer consideration of this question pending its decision in *Alderman.* We point out, however, that the few logs of

defendant overhearings involved in this case were found "not remotely relevant" by both courts below, and precisely fit within the classification of logs described in our *Alderman* brief as "so clearly unrelated to the case at issue that the court may easily determine that further disclosure is not necessary" (See Brief for the United States in *Alderman, id.* at 16). These logs are presently on file with the Clerk and available for the Court's inspection.

3. Petitioners broadly argue that they were deprived of their constitutional rights because the district court did not require the government to disclose to the district court or to the defense any overhearings of defense counsel (Pet. No. 895, pp. 69–72).

*a.* The claim that the position taken by the district court on the attorney overhearings was contrary to this Court's order of remand rests upon the assumption that by its short *per curiam* order this Court *sub silentio* meant to overturn the settled rule that only one whose "right to privacy of person or premises" has been invaded may challenge illegal government action (*e.g., Wong Sun* v. *United States,* 371 U.S. 471, 491–492; *Jones* v. *United States,* 362 U.S. 257, 261; *Goldstein* v. *United States,* 316 U.S. 114; cf. *Baker* v. *United States,* 401 F. 2d 958 (C.A.D.C.)),[33] as well as this Court's earlier admonition in *Nardone* v. *United States,* 308 U.S. 338, 341–342, that the scope

[33] Nothing said in *Mancusi* v. *DeForte*, 392 U.S. 364, or *Simmons* v. *United States*, 390 U.S. 377, did away with the established requirement that, to raise a Fourth Amendment claim, a defendant must show a right to privacy in the area subjected to the governmental intrusion. See, *e.g.*, *DeForte*, *supra*, 392 U.S. at 367–369.

of "such auxiliary inquiries" are within the sound discretion of the trial judge and may be "closely confined" so long as the issue of taint is fully explored. Cf. *Lawn* v. *United States*, 355 U.S. 339, 348–349.

Here, the district court required the government to produce all overhearings of defendants, whether relevant or not. On their side, the defense was allowed to "produce whatever evidence you can find in regard to electronic eavesdropping and the other defendants in this case, or the lawyers in this case, in which this trial was discussed or preparations for this trial was discussed" (II H.D.A. 805–806; see also II H.D.A. 857–858). That the defendants were not able to make any such showing[34] hardly establishes any improper limitation by the district court at the eavesdrop hearing.

*b.* Undeniably, the government had a duty to turn over to the defense or the district court all records in its possession in which a defendant was overheard talking to his lawyer. As *Black* v. *United States*, 385 U.S. 26; *O'Brien* v. *United States*, 386 U.S. 345, and *Granello* v. *United States*, 386 U.S. 1019, illustrate, the government is committed to the disclosure of any interception of a communication between a defendant and his attorney in a pending case, irrespective of whether that conversation is relevant to the issues in

[34] In accord with the guidelines set by the district court, the defense introduced a substantial amount of evidence in support of its claim of undisclosed governmental overhearing (see the details of this evidence set out in the opinion of the district court, 273 F. Supp. at 144–147; Pet. No. 895 App. 82–89). None of this evidence established the existence of any producible overhearings.

the case. We further recognize an obligation to disclose in a situation where defense counsel was overheard talking to a third party about a particular defendant's case in such a way that improper overhearing by the government could be said to have interfered with the defendant's right to counsel. The failure to make any such disclosure in this case simply stemmed from the fact that the government overheard no conversations involving counsel of record relating in any way to this case, much less one which could be characterized as relating to matters within the councils of the defense.

We stress, however, that to recognize an obligation to produce in the foregoing situations is far different from saying that a defendant, either under his own right of privacy or under his right to counsel, is entitled to production of conversations between third parties simply because one of these parties is an attorney or an alleged investigator (See Pet. No. 895 71–72) for a defendant in a criminal case. An attorney, as anyone else, engages in many different conversations with many different individuals both in his professional capacity and otherwise; obviously what he says about client B's case may not have the remotest bearing on the case of client A. The fact that the government has been guilty of illegal surveillance does not justify allowing client A to review the records of the overhearing of the conversation between the attorney and B which has no relation to A's case.

*c.* The logs of the overhearings of counsel of record were turned over to the court below for *in camera*

examination, not because the government believed that they had any relation to this case but because, during oral argument, the court of appeals evinced concern as to the nature and extent of such overhearings, apparently prompted by petitioner's broad claims to that effect. Our purpose was simply to remove any concern the court might have by showing that no overhearings of record counsel in our possession had even the remotest bearing on this case. The court of appeals agreed, observing that its examination of the logs revealed that the information therein "is completely irrelevant to the Hoffa case before this Court" (Pet. No. 895 App. 98).[35]

3. Petitioner Dranow separately urges that the district court's finding that he was mentally competent to participate in the hearing was erroneous.[36] The record, however, shows that Dranow was sufficiently competent to meet the standard of trial competency

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[35] There were five such overhearings of counsel of record all occurring either long before or long after the trial in this case. They were with other clients or third parties having nothing to do with any defendant in this case. The logs of these overhearings are presently on file with the Clerk of this Court.

No logs of any conversation between alleged investigator O'Brien and his counsel were disclosed to the court of appeals because the government had overheard no conversation involving O'Brien and any counsel of record in this case. Moreover, as we pointed out in our brief in opposition in *O'Brien* v. *United States*, No. 823, O.T. 1966, p. 11, in the overheard conversation between O'Brien and his counsel only O'Brien was heard to speak and then only relating to bail in a case pending against him.

[36] Petitioner Dranow's further argument that he was incompetent at the time of trial is fully answered in our original brief in opposition in the 1966 Term (Br. in Opp. in No. 1003, O.T., 1966, pp. 57-61).

adopted by this Court in *Dusky* v. *United States*, 362 U.S. 402, that the accused have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and have "a rational as well as factual understanding of the proceedings against him." It should, moreover, be noted that participation by the defendant is of much less significance at this type of hearing than would be the situation at trial. As the trial court pointed out (II H.D.A. 830):

> This is not a trial of a criminal case where it is necessary for this defendant to communicate his defenses to his counsel. This is in the nature of a motion for a new trial. There is no evidence that Mr. Dranow has any information to communicate to his lawyers that could conceivably be admissible within the confines of this limited hearing.[37]

At the competency hearing (held shortly before the eavesdropping hearing), three psychiatrists—Drs. Adams, Burris and Seglin—testified for the defense. Based on their examination of Dranow on July 24, 1967 (II H.D.A. 762, 775, 778) and their examination of the reports of psychiatrists at the Federal Medical Center at Springfield, where Dranow had been in custody since October 1966 (I H.D.A. 186), each of these doctors stated his belief that Dranow was so severely depressed as to render him incapable of assisting counsel and understanding the contemplated eavesdrop hearing (II H.D.A. 763–765, 775–776,

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[37] It was admitted by defense counsel that Dranow was incarcerated during the entire period—*i.e.*, January 1963 to July 1965—of the trespassory eavesdropping of Sigelbaum's office (II H.D.A. 831–832).

779). In addition, the defense submitted various psychiatric records relating to Dranow's incarceration in Springfield, including diagnoses to the effect that Dranow suffered from a "borderline schizophrenic reaction, paranoid type, of a chronic nature, of mild to moderate severity" (see, *e.g.*, I H.D.A. 196, 191). While several of the Springfield reports indicated that Dranow was a "paranoid schizophrenic," a progress report of July 14, 1967—shortly before the eavesdrop hearing—stated that he had improved and was "mentally and physically able" to make the trip to appear at the hearing (II H.D.A. 749–750).

The government adduced the testimony of Dr. Benjamin Kesert, a psychiatrist, who had examined Dranow on July 23, 1967 (II H.D.A. 659). He was of the opinion that Dranow was mentally competent, understood the charges against him and was able to cooperate with counsel (II H.D.A. 661–664, 665–666, 671). Doctor Kesert further testified that none of the medical reports prepared by psychiatrists at Springfield changed his views as to Dranow's mental competency (see II H.D.A. 681–682, 685–686, 689–690, 694–695, 699–700, 709–710). The trial court found Dranow competent to participate in the hearing (II H.D.A. 830).

The evaluation of the expert testimony was for the trial judge.[38] There is no reason for this Court to overrule his determination. *E.g., United States* v.

[38] While petitioner Dranow now attempts to cast some doubt on Dr. Kesert's qualifications (see Pet. No. 911, pp. 9, 11), at the hearing no defense counsel found it necessary to cross-examine Kesert concerning his qualifications as brought out in his direct examination (see II H.D.A. 656–658).

*Armone*, 363 F. 2d 385, 403 (C.A. 2), certiorari denied, 385 U.S. 957; *Merrill* v. *United States*, 338 F. 2d 763, 765–766 (C.A. 5); *Feguer* v. *United States*, 302 F. 2d 214, 236 (C.A. 8), certiorari denied, 371 U.S. 872; cf. *Holt* v. *United States*, 329 F. 2d 368, 372 (C.A. 7), certiorari denied, 379 U.S. 862.

## II

### THE ORIGINAL ISSUES ON APPEAL

As noted, the issues relating to the original proceedings are fully dealt with in our original brief in opposition in this case, and we refer the Court to that brief for our detailed response (see Government's Brief in Opposition in No. 1003, O.T. 1966, pp. 33–63). We answer here only petitioners' claim concerning an alleged violation of the right to confrontation under *Bruton* v. *United States*, 391 U.S. 123 (see Pet. No. 895, pp. 84–87).

During the cross-examination of petitioner Dranow at trial, the government sought to impeach him by reference to certain letters he had written to one Irving Link indicating that various of the defendants had put money away for him on a daily basis in connection with certain properties which were involved in loan applications (see Br. 62–63). The jury was first admonished by the trial judge to consider this evidence only against Dranow (III D.A. 2018, 2021). After further reflection, however, the court decided to exclude this evidence as to these letters even as to Dranow, and so instructed the jury (III D.A. 2065–2066).

*Bruton* does not govern this case. In *Bruton* this Court held that the introduction at a joint trial of a confession of one codefendant which implicated another was constitutionally impermissible under the Confrontation Clause of the Sixth Amendment, and that an insulating instruction limiting consideration of the confession to the declarant did not remove the constitutional violation. In short, this Court concluded that it was unrealistic to assume that a jury could find a confession trustworthy and believable as to the declarant, and yet disregard it as to a co-defendant specifically implicated therein. In this case the jury was not called upon to perform such "mental gymnastics" since they were instructed not to consider the evidence of the letters against *any* of the defendants. See *United States* v. *Muller*, C.A. 3, No. 17075, decided on October 10, 1968, petition for a writ of certiorari pending, No. 1244 Misc., this Term. Moreover, unlike the situation in *Bruton*, at the time the letters were referred to Dranow was a witness at trial and fully available to his codefendants for cross-examination."

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" Petitioners' reliance upon *Bajcec* v. *United States*, 392 U.S. 297, is misplaced. In this pre-*Bruton* case involving a declarant in a joint trial who testified in his own defense, this Court did not reverse the codefendant's conviction because the declarant's implicating confession was introduced at trial; this Court merely remanded the case to the court of appeals for its consideration in light of *Bruton*. In the instant case the court of appeals has already considered the implications of *Bruton* and decided that it does not control here (See Pet. No. 895 App. 101–103).

## CONCLUSION

For the reasons stated herein and in our brief in opposition in No. 1003, O.T., 1968, the government is of the view that the petitions for writs of certiorari should be denied. We recognize, however, that the Court may wish to defer consideration of the petitions because one of the issues raised is presently pending in the the *Alderman* case.

Respectfully submitted,

ERWIN N. GRISWOLD,
*Solicitor General.*

WILL WILSON,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
JEROME M. FEIT,
*Attorneys.*

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